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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

Nos. 682 and 683.

EDMUND BURKE, *Appellant*,

v.

SOUTHERN PACIFIC RAILROAD COMPANY AND KERN Trading and Oil Company, *Appellees*.

J. I. LAMPRECHT AND F. M. AIKEN (TRUSTEES), *Appellants*,

v.

SOUTHERN PACIFIC RAILROAD COMPANY (A CORPORATION), Kern Trading and Oil Company (a corporation), and T. S. Minot, *Appellees*.

ON CERTIFCATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

The facts involved in this case are few and simple. They are clearly stated in the certificate of the court below, and restated in the briefs filed by the opposing

parties. They need not be stated here again. The Government sought and obtained leave to file a brief in the case because, in the decision of the questions at issue, there is or may be involved the existence of property rights of enormous value, which are claimed by the United States.

To protect those interests, a suit has already been begun by the government in the southern district of California. Other like suits are in immediate contemplation. Under these circumstances, it is believed to be now the duty of the government not merely to present its contentions concerning the questions of law propounded in the certificate, but also, to a certain extent, and in a general way, to indicate certain matters of fact, which the government expects to establish and rely on in its suits, but which are either omitted or imperfectly supplied by the present record. Such matters (except where subjects of judicial notice), will of course be understood as presented here merely to illustrate the nature and public importance of the general subject-matter which may be affected by the court's opinion when rendered, without, of course, the slighest desire or expectation that they will be considered as facts of the record for the purpose of adjudicating this particular controversy.

Some 125,000 acres of valuable mineral lands are thought to be included in the general descriptions of patents precisely similar to the one here in controversy, which were heretofore issued to the defendant railroad company. The Government claims that by

virtue of the exception in the granting act of July 27, 1866 (14 Stat., 292, secs. 3 and 18), and joint resolution of June 28, 1870 (16 Stat., 382), and the repetition thereof in the patents, all these lands, as well as many others, now claimed by other railroad companies under similar conditions, are its property. The value thus involved is believed to be enormous, and the effect of the decision in this cause upon the Government's claim may prove to be vital.

Before proceeding to the argument, we should point out that the letter printed in the railroad company's brief as "Appendix D" is not an opinion of the Attorney General, and that its publication was never authorized or intended by him. The Government's appearance in this cause, and the initiation of the suit already begun by it, is a sufficient evidence of the present attitude of the Department of Justice, if that be material.

FIRST QUESTION.

Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to be such at or prior to the date of the patent of July 10, 1894?

This exact question was elaborately discussed by this court in the case of *Barden* v. *Northern Pacific Railroad Co.*, 154 U. S., 288. It was there determined that the grant to the railroad was *in praesenti*, that the grant operated to transfer only nonmineral lands to the railroad; that it would be an indefensible extension of the grant to limit the exception of mineral lands to "known" mineral lands, no matter

at what time they should become so known; that the grant should be construed against the grantee; that a patent, reciting that the lands enumerated therein are nonmineral, and containing no exception of mineral lands, would constitute *res adjudicata* as to the character of the lands; but that, except through the medium of such actual adjudication, title to lands actually mineral in character never could pass under the grant to the railroad, and even in that event only because the patent showed an actual judgment that the lands were nonmineral.

The face of the grant, together with the thorough reasoning in the *Barden* case, will not allow further discussion of this question.

SECOND QUESTION.

Does a patent to a railroad company under a grant which excludes mineral lands as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the lands, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

The original grant excepted from its operation all mineral lands. The patent before the court neither exceeded nor fell short of the terms of the grant. It accurately fulfilled them by excepting from its operation all mineral lands. Neither through the grant nor the patent has any title to mineral lands gone out of the United States, or to the railroad company. But in the question now presented

it is asked whether, without considering the exception in the patent, the Land Department had power under the grant to pass title to lands mineral in character, before making a finding that the lands were nonmineral. This presupposes an intention or willingness so to do on the part of the Land Department, and it will always be remembered that the exception in the patent effectually negatives any such disposition.

The question has a dual aspect:

1. Whether the Executive has power to alter and enlarge the terms of a grant.

2. Whether the patent, though incapable of altering or affecting the grant, is a conclusive adjudication that the lands enumerated in the patent are nonmineral, even though there was no finding nor actual determination of that question, and even though the patent fails to show by its recitals any such determination. (The exception of mineral lands of course shows exactly the contrary.)

(*a*) It was definitely and finally decided in *Barden* v. *Northern Pacific Railroad Co.*, *supra*, that the firm intention of Congress was to reserve all mineral lands to the United States, without regard to the time at which their character should become known; in other words, no title to mineral lands passed by the *grant*. The court then says that the Land Department has the right to determine what lands are or are not mineral—and of this, more later—but until such determination is made there is no method

provided by Congress by which title to lands actually mineral may pass to the railroad. Even in this event it is only through the error of the Land Department in its judgment that title may pass. Very different is the question arising under a supposed attempt by the Land Department to transfer title to great bodies of mineral lands, either knowing that they are mineral, or without making any examination to determine. In that event the patent usurps a function beyond the mere deed of further assurance which it is intended to be in the case of railroad and similar grants (*Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, 251;[1] *Langdeau* v. *Hanes*, 21 Wall., 521, 529),[2] and assumes to itself the character of an original convey-

[1] "While not essential to transfer the legal right the patents would be evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved from the possibility of forfeiture for breach of its conditions. They would serve to identify the lands as coterminous with the road completed; they would obviate the necessity of any other evidence of the grantee's right to the lands, and they would be evidence that the lands were subject to the disposal of the railroad company with the consent of the Government. They would thus be in the grantee's hands deeds of further assurance of his title, and, therefore, a source of quiet and peace to him in its possession" (p. 251).

[2] "In the legislation of Congress, a patent has a double operation. It is a conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation."

ance independent of the legislative grant upon which it must depend for its validity. Thereupon the Executive will becomes substituted for the legislative, and the patent, if it purports to convey land against the will of or without authority from Congress, violates Article IV, section 3, of the Constitution, and is void. *Davis's Admr.* v. *Weibbold*, 139 U. S., 507. So here there was no authority to transfer title to mineral lands, known or unknown, and no attempt by the Land Department to do so could be successful, except on the theory that a decision had actually been made, as hereinafter discussed.

(*b*) It is contended that, though the Land Department is without power to alter the terms of the grant, nevertheless the patent, (or the issuance of the patent), constitutes a conclusive judgment by an authorized tribunal that all the land included therein is nonmineral. Again it is necessary to pass over the absurdity of a presumption which must run exactly contrary to the express exception that appears on the face of the patent, and which must also be sustained, if at all, in the face of facts of which this court has judicial knowledge, viz, that the report of the Commissioner of the General Land Office in 1868 (hereinafter quoted), approved by the Secretary of the Interior, conclusively shows that no final determination was made, but that the Land Department relied on the exception in the patent to fulfill the will of Congress.

Our contention here is that no such presumption can arise from the patent nor from the issuance thereof unless at least—

> (*a*) The patent affirmatively recites that the mineral character of the land was investigated and determined; or
>
> (*b*) The patent is shown to have been issued under a statute which conclusively required that such an examination and determination should be made before the patent could properly issue.

This matter of *res adjudicata* was carefully considered by this court in *Barden* v. *Northern Pacific Railroad Co., supra*. It there held, in relation to the Northern Pacific grant, that it was within the power of the Land Department to make a complete examination and determination as to the character of the lands, and that a patent, *reciting the character of the lands, that they were nonmineral*, would operate by way of an estoppel by judgment against the Government.

> Patents issued after an examination and determination of the fact by the government whether portions of the land embraced in such grants did or did not contain other minerals have been held as conclusive in subsequent controversies, and of this we shall speak more fully hereafter, but grants in aid of railroads (and we speak of no other grants) before such determination and issue of a patent have never been held to pass other minerals than iron or coal, and it is only with other minerals, and with lands containing them, that we are concerned in this case (p. 318).

> The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the land department. Until such patent is issued, defining the character of the land granted, and showing that it is nonmineral, it will not comply with the act of Congress (p. 330).
>
> The government can not be reasonably expected to issue its patent, and is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent, which would be taken as its determination, that no mineral lands exist therein (p. 331).

These statements in the *Barden case* are no more than application of the fundamental rules relating to estoppels by judgment. In fact the decisions of the Land Department are judgments of a special tribunal. Matters properly before the department and actually decided are *res adjudicata*, but other matters are open to determination at any time.

> The estoppel of a judgment does not extend to matter not expressly adjudicated, which can only be inferred by argument or construction from the judgment, except where they are necessary and inevitable inferences, in the sense that the judgment could not have been rendered as it was without deciding such points. 23 Cyc. 1297.

Citing *Hopkins* v. *Lee*, 6 Wheat. 109, at 114.

A judgment is conclusive on another suit only when it is shown either upon the face of the record or by extrinsic evidence that the precise question was raised in the former action.

> According to Coke, an estoppel must "be certain to every intent;" and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence.
>
> *Russell* v. *Place*, 94 U. S., 606, 610.

The *Barden case* concedes (unnecessarily for the purpose of the decision) that the Land Department has power under the Northern Pacific grant to determine conclusively the character of land within the grant. If it were necessary for the purposes of this case, it might be questioned whether, under the Southern Pacific grant and the special exclusion clause of the joint resolution of 1870, the Land Office had any right or power to issue a patent without expressly excepting and reserving mineral lands. Not only does nothing appear in the act of 1866 to necessitate such decision, but, further, the joint resolution demands, instead of a judgment, a reservation in the patent itself. But whether or not the power existed, it is sufficiently obvious from the face of the patent that there is no recital that the lands are nonmineral, and it is also clear, not that an adjudication was made, but that no determination was even attempted.

This claim of estoppel by this patent is nurtured by a misapplication of the opinions in *Deffeback* v. *Hawke*, 115 U. S., 392; *Davis's Admr.* v. *Weibbold*, 139 U. S., 507, and *Shaw* v. *Kellogg*, 170 U. S., 312, backed by the discredited doctrine in the case of *Cowell* v. *Lammers*, 21 Fed., 200. The first two of these cases are carefully distinguished from a railroad grant case in *Barden* v. *Northern Pacific Railroad*, *supra*, by Justice Field, who delivered the opinion in each. The distinction is that, in preemption, town site, or homestead cases, the Land Department is authorized to grant lands upon a determination, and only upon a determination, of certain prerequisite facts—among which is the fact that the land is not chiefly variable for mineral. In these cases, therefore (preemption, homestead, and town site), it may well be said that titles to lands not known to be mineral at the time of patent are granted by the patent, because they are not excluded, but by inference are included, in the acts of Congress authorizing the grants. This is clearly pointed out in the Barden case. And it should further be noted that in railroad grants title passes by the *statute*, and not by the patent, whereas the opposite is true in town site, preemption, and homestead cases. Yet unless it can be said that the patent can operate to pass reserved mineral lands to a railroad upon some other theory than that of *res adjudicata* (and it has not been so contended), no title to the land here involved passed to the Southern Pacific Railroad either by grant or by patent.

Shaw v. *Kellogg* is in exact accord with the theory of estoppel here advanced. In that case the surveyor general of New Mexico, whose duty it was, determined that certain lands were nonmineral in character. The surveyor general approved the survey unconditionally, but placed (under instructions from the General Land Office) a reservation of mineral lands upon his certificate of approval of the plat. Time after time the Land Office ruled that the action taken was a finality; that the surveyor general had decided the lands to be nonmineral. It refused to issue a patent at the request of the grantee. The court held that there had been a final determination by the properly authorized officer (the surveyor general) that the land was nonmineral, and that, after such final determination, an exception on the plat was ineffective to offset the effect of the judgment. One has only to read the statement of the case and the opinion to note the constant reiteration of this fundamental feature—without which the decision could not have been rendered—that there had been an actual and final determination that the land was nonmineral, and that the Land Department so regarded it.

Shaw v. *Kellogg* has many points which shows its entire inapplicability as authority in the present case. In the first place, the grant was of a body of land, "not mineral," to be selected as a whole, by the grantee, and to be approved by the surveyor general as being properly selected. There was no

reservation of mineral lands in the tract to be selected, and nowhere did the grant make any such reservation, nor authorize the Land Department to do so. No right of lieu selection was given, for the obvious reason that the tract granted must, by the terms of the grant, be nonmineral. The tract was selected as required, and was approved as the statute directed. No reservation was attached to the certificate of approval, although the General Land Office attempted, through the surveyor general, to insert a reservation of mineral lands, which was not included in the terms of the grant, on the plat. The grantee was powerless to compel the Land Office to issue a patent and the Land Office repeatedly stated that the surveyor general had made a final adjudication that the lands were nonmineral, and were therefore removed from its power and segregated from the public domain.

In this it must be noticed that as the grant made no reservation of mineral lands, an attempt by the Land Department to reserve them was not fulfilling any intent of Congress; that final judgment had been rendered by the surveyor general, and that his judgment was subsequently many times accepted by the Land Department; that the patentees made bona fide effort to remedy any unauthorized reservation in their title, but were powerless to compel any further adjudication or patent by mandamus or otherwise; and that if the reservation by the Land Department, which had been subsequently so many

times repudiated by it, were valid, it would, by its failure to decide, effectively have thwarted the will of Congress, since the three-year period, within which the grantees were empowered to select, had expired.

Furthermore, in *Shaw* v. *Kellogg*, the discovery of mineral was made long after the approval of the selection, whereas in the present case the land was of known mineral character at the time of the patent, and presumably would have been discovered so to be had the Land Office made any examination of the ground, instead of relying on the exception in the patent.

Certainly there is nothing in the cases cited by the railroad which encourages any contention that a patent can operate as a judgment upon any matter which was not necessarily adjudicated, and does not appear from the face of the patent to have been adjudicated.

THIRD QUESTION.

Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

1. The reservation in the patent purports to fulfill the will of Congress by refusing to pass title to lands which Congress, in the grant and in the joint resolution of 1870, directed to be reserved. It therefore does not come under that class of cases in which the Land Department has attempted to enlarge or restrict the grant made by Congress, and thus substitute its will for the will of Congress.

That such reservation was consistent with the right and duty of the Land Department is certainly the law at the present time. Upon this point the *Barden case* suggests (p. 331):

> The government can not be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent, which would be taken as its determination, that no mineral lands exist therein.

The placer-mining law affords an analogy. It provides in effect that if the applicant for patent fails to include an application for all known lodes within the boundaries of the mining claim he shall be deemed to have waived all claim to such known lodes. This court has held that the legal effect of this provision is to create an exception of lodes known to exist at the time when the application to patent the placer claim is made. The Interior Department, in administering this law, adopted the practice of phrasing the patent in general terms calculated to exclude from its operation all such known lodes.

In *Reynolds* v. *Iron Silver Mining Co.*, 116 U. S., 687, 697, this court, with reference to such an exception, observed:

> It is said that this part of the patent is void because there was no law which authorized its insertion, and because it is in conflict with the

> rights of the claimant of a placer mine under the acts of Congress.
>
> Without deciding on the effect of the acceptance without protest of a patent with such exceptions in the granting clause, where their insertion is the voluntary act of the officers who execute the instrument, it is sufficient to say that these conditions but give expression to the intent of the statute.

In the case of *Noyes* v. *Mantle*, 127 U. S., 348, involving the same statute, the court said (p. 354):

> A copy of the patent is not in the record, so we can not speak positively as to its contents, but it will be presumed to contain reservations of all veins or lodes known to exist, pursuant to the statute.

The placer patent, even with the exception, has the effect of conveying *prima facie* title to all of the land within the boundaries of the placer claim. (*Iron and Silver Mining Co.* v. *Mike and Star Co.*, 143 U. S., 397, 401.) This necessarily means an obstacle in the way of the free exploration and location by the public of the known lodes. To avoid it, why might not the Interior Department undertake, in the placer proceedings, to inquire concerning known lodes and except specifically in the patent all those that were thus found to exist, inserting in the patent, as evidence that the inquiry and adjudication had been made, a recital or declaration appropriate to show that the remainder of the placer claim was free of such lodes? Is it not reasonable to say that the department has power to make such an inquiry and

finding—that is, to determine finally the character of the land—if it chooses to exercise the power under this statute? But instead of attempting to do so it has chosen the alternative of inserting a general exception, and this practice has been approved by the court. We submit that there is a very close analogy between this statute and the one involved in the present case.

The Supreme Court of California has uniformly held that exceptions of mineral lands inserted in railroad patents are valid.

> *McLaughlin* v. *Powell*, 50 Cal. 64; *Chicago Quartz Mining Co.* v. *Oliver*, 75 Cal. 194; *Carr* v. *Qingley*, 57 Cal. 394; *McLaughlin* v. *Heid*, 63 Cal. 208, 218; *Gale* v. *Best*, 78 Cal. 235, 240; *Van Ness* v. *Rooney*, 41 Cal. Dec. 695, 116 Pac. Rep. 392.

The latest case involving this question is *Eastern Oregon Land Company* v. *Willow River Land and Irrigation Company*, 187 Fed., 466. In this case Judge Bean expressed his conviction of the effectiveness of the exception of mineral lands in the patent. This view was combated upon appeal by Judge Ross, upon the same grounds as in the *Roberts case* (the companion case to the present case). Judge Gilbert, who had heard the appeal of the present case, concurred in the views expressed by Judge Bean, and Judge Morrow expressed no opinion upon this point.

Section 4 of the act of July 27, 1866, authorized the Secretary of the Interior to issue patents which

confirmed the title created by the grant. When the Secretary of the Interior issued a patent containing the exception imposed by the granting act, did not the patent *confirm* the title, and was it not, therefore, authorized by the granting act?

It must be conceded that if the patent issued by the Secretary of the Interior constitutes a fulfillment of the contractual obligations of the United States under the act of July 27, 1866, the patent was authorized by Congress. Suppose that the act had contained no provision for the issuance of patents; and that after the grant had vested in the railroad company Congress had passed a law authorizing the Interior Department to issue patents to the railroad company and had directed that the patents should include an exception of mineral lands. Would it be contended that the patents did not constitute a full discharge of the Nation's obligation? Or suppose that the subsequent act had simply directed the Interior Department to issue patents confirming the title created by the original granting act. Would not patents containing the exception of mineral lands found in the granting act have been authorized? Does it matter that the authority of the Interior Department was expressed in the original granting act itself? No one can deny that the patent issued in this case did *confirm* to the railroad company the title created by Congress. Did Congress intend that the patent should do more?

Counsel for the railroad company will probably cite upon this question *Cowell* v. *Lammers*, 21 Fed.

200, and *Francouer* v. *Newhouse*, 40 Fed. 618. These decisions can not be accepted as authority. Judge Sawyer, who wrote the opinions in both cases, based his decisions upon the theory that the exception of mineral lands included only lands known to be mineral at the time of the enactment of the grant. This theory was subsequently repudiated by this court in *Barden* v. *Northern Pacific*.

In 1868 the President communicated to Congress the report of the Secretary of the Interior for that year, in which was included a report to the latter official by the Commissioner of the General Land Office, from which we extract the following:

> MINERAL AND AGRICULTURAL LANDS—RAILROAD SELECTIONS.
>
> In every case reported from the district land officers of selections made under the acts of 1862 and 1864, for the Pacific railroad, the agent of the company in the first instance is required to state in his affidavit that the selections are not interdicted, mineral, nor reserved lands, and are of the character contemplated by the grant. Upon the filing of lists with such affidavits attached, it is made the duty of registers and receivers to certify to the correctness of the selections in the particulars mentioned, and in other respects. They subsequently undergo scrutiny in this office, are tested by our plats, and by all the data on our files, sufficient time elapsing after the selections are made for the presentation of any objections to the department before final

action is taken; and to more effectually guard the matter, there is inserted in *all* patents issued to said railroad company a clause to the following effect: "Yet excluding and excepting from the transfer by these presents *all mineral lands*, should any such be found to exist in the tracts described in this patent, this exception, as required by statute, 'not extending to coal and iron land.'" A decision is said to have been made by the Supreme Court of California, which, it is claimed, decides that an occupant of a mining claim having no title from the United States has no such standing in court as enables him to enforce the exception as to mineral lands, in patents issued to railroad companies, and may, therefore, be lawfully ejected from lands included within the general description of the tracts patented to such companies, notwithstanding the particular tract may be mineral in character, and fall within the exception. Not having seen that decision, we are ignorant as to the exact character of the ruling, but it is not understood how a person in the occupancy of mineral lands under the local customs and rules of miners, protected by the license granted in the first section of the act of July 26, 1866, could be ejected by a railroad company having no title to the land at all. The Government license, it is reasonable to suppose, would constitute a sufficient defence against any one not able to show a better title. The grantee of such license is no trespasser upon the public lands, and although the license is revocable by the United States, it can not be considered

as revoked by a patent to a railroad company when such instrument expressly excepts and excludes from the grant all interdicted mineral land. Claimants authorized to apply for and to obtain patents under the mining act have an efficient remedy in its provisions, and by taking the proper steps may obtain patents for their claims, even should they happen to be embraced within tracts patented to railroad companies, as the exceptions in such patents enable the United States to segregate the mineral lands included by distinct and separate conveyance to mining claimants. Placers more valuable for mining than for agriculture can not be entered as preemption or homestead lands, nor can they be selected by railroad companies. There may be difficulties, and sometimes even hardships, connected with the system of filing affidavits to prove the mineral character of lands claimed by a railroad company, or an agricultural settler, and taking witnesses before the local land officers; but these are, in a great measure, inseparable from the subject matter; preemptors and homestead settlers have the same difficulties to contend with, more onerous in the new States and Territories than in the older States, from the sparseness of the population not justifying additional land offices. It has been suggested to this office that the Government should appoint a commission to segregate the mineral from the residue of the public lands; but let any one consider the vast amount of money expended by practical miners in excavations to test the value of mines, subse-

quently abandoned as worthless, and some idea may be formed of the time and expense such an undertaking would require, and how little confidence it would be likely to inspire. When a miner has taken possession of mineral lands under the license of the Government, and has developed their character for mining purposes, it would seem that the task of protecting his rights could not be more onerous than that which every settler is liable to encounter in defending himself against adverse claimants. The regulation of filing affidavits is simply a means of ascertaining the class to which a particular tract of land may belong, and although it may not be the best that could be devised, it is the only practical mode that has suggested itself to meet the difficulty of disposing of different classes of land mingled together in such a way as to render it frequently impossible to tell, without great labor and expense, whether a particular subdivision belongs to one or the other class.

Executive Document No. 1, H. R., 40th Cong., 3d session, p. 152 et seq.

June 28, 1870, Congress, with the above report before it, and in order to confirm its grant to the Southern Pacific Railroad, the validity of which was in some doubt, owing to the route chosen by the company, passed the following joint resolution:

Upon the report of the Commissioners that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said

> company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July 27, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act.

The language of this resolution indicates an intention on the part of Congress that the issuance of patents should not be delayed until the lands could be examined for indications of minerals, but that patents should be issued as rapidly as the railroad was constructed, the intention being that the lands earned by the construction of one section of the railroad should be available for the purpose of raising funds for the construction of the succeeding sections of the railroad. The resolution provided in express terms that these patents should cover all of the lands coterminous with the constructed sections of the railroad, and in effect provided that the patents should "save and reserve" the lands excepted by the provisions of section 3 of the original granting act, which included the exception of mineral lands. In this connection it should be borne in mind that from 1862 to 1871 Congress granted more than 125,000,000 acres of land in aid of the construction of railroads. These grants provided for the issuance of patents as rapidly as the railroads were constructed in sections of 20 or 25 miles. By the terms of these grants the railroads were required to be completed within ten

years from the dates of the grants. All of these grants (with a few exceptions) were of lands situated in regions known to contain rich deposits of minerals. It was a physical impossibility for the Interior Department to make an examination and adjudication as to the mineral or nonmineral character of 125,000,000 acres of land without giving to the business a vast deal of time. There was therefore a logical reason why Congress should direct the issuance of patents for all of the odd-numbered sections coterminous with the completed sections of the railroad, and at the same time direct that the patents should save and reserve the lands excepted by the terms of the granting act.

Despite statements of appellees to the contrary, the direction that the Secretary issue patents, "expressly saving and reserving the restrictions * * * provided for in the third section of said act" (among which was the mineral exception), was not debated in Congress, though a proposed amendment to it (which was in no way pertinent to the present discussion) received considerable attention. Not one word appears in the Congressional Globe which leads to the conclusion that the phrase does not modify the antecedent word "patents." This is the proper construction grammatically and logically, and, in view of the information then before Congress, the conclusion is irresistible that Congress was cognizant of, and approved, the action of the Land Department. Furthermore, the joint resolution is part of the grant, and a proper amendment to the grant, so that its terms

must be construed most strongly against the grantee. Certainly it can not be contended that Congress, with the report of 1868 before it, and knowing the reliance which the Land Office was placing upon the reservation of mineral lands in the patent, would have phrased the joint resolution as an apparent ratification of this practice unless it assented thereto.

Even if the phrase "expressly saving and reserving all * * * the conditions and restrictions provided for in the third section" can be twisted out of its ordinary grammatical and logical meaning, and merely expresses a determination that this may in some way be accomplished, nevertheless the Land Department adopted a method sufficient to accomplish this end, and, since Congress was aware of it, the method was certainly approved.

The Government claims that from the inception of railroad grants containing an exception of mineral lands, the Department of the Interior construed them as authorizing the issuance of patents, without an adjudication as to the character of the lands, but as authorizing in lieu thereof, a provision in the patents excepting mineral lands, and this construction was acted upon by the Interior Department for a period of nearly forty years, including the time of the issuance of the patent involved in the present case.

Railroad grants commenced with the Illinois Central grant of September 20, 1850, and ended with the Texas Pacific grant of March 3, 1871. Prior to the Pacific Railroads bill of July 1, 1862, all of the

railroad grants were situated in the Middle West, in nonmineral regions, and these early grants contained no exception of mineral lands. Commencing with the Pacific Railroads grant of July 1, 1862, all railroad grants (with a few exceptions) were situated in regions known to contain minerals, and all of these grants contained an exception of mineral lands in substantially the same terms as in the act of July 27, 1866. The administration of these railroad grants containing an exception of mineral lands did not become a practical question before the Interior Department until the year 1865, when the first application for patent was made by the Central Pacific Railroad Company under the act of July 1, 1862. In its litigation above referred to, the Government expects to show that when list No. 1 under the Central Pacific grant came before the General Land Office, the Commissioner of the General Land Office, Hon. J. M. Edmunds, prepared a form of certificate to be used as to lists and selections under railroad grants containing an exception of mineral lands; that this certificate in terms approved the list or selection, but contained the following proviso:

> Excluding, however, from the approval and from the transfer of the patent that may issue "all mineral lands," should any such be found in the tracts aforesaid; but this exclusion, according to the terms of the statute, shall not be construed to include coal and iron.

Also that the certificate was transmitted to the Secretary of the Interior, accompanied by a letter to

the effect that the certificate would be made the basis of the patent to be issued thereunder, and that, in the absence of contrary instructions, the form would be used in submitting like approvals thereafter; that the form was approved by the Secretary; and that later, during the year 1865, a form of patent was prepared, which contained an exception of mineral lands in substantially the language of the granting acts, and in the exact language of the certificate of the Commissioner of the General Land Office approving lists and selections for patent; that the form of patent thus prepared was submitted to and acquiesced in by the grantees under the grants theretofore made, and likewise became known to and was acquiesced in by the grantees under subsequent railroad grants, and continued in use from January 4, 1866 (the date of the first Central Pacific patent), until 1904.

This form of patent is given in full as the standard form used for the conveyance of railroad lands at page 288 of the official and authoritative compilation published in 1880 pursuant to direction of Congress, entitled "The Public Domain."

It is impossible to conceive that Congress has not been frequently advised of the practice of inserting an exception of mineral lands in railroad patents. In not one instance down to the present time has it ever disapproved of this practice. Not only did it acquiesce, but subsequently to the Commissioner's report for the year 1868 it enacted a number of grants containing an exception of mineral lands, with pro-

visions for the issuance of patents, in substantially the same language as the prior grants, including the act of July 27, 1866, without the slightest suggestion, by legislative enactment, committee report, or congressional debate that the construction placed upon these acts to the effect that the Interior Department was authorized to insert in the patents an exception of mineral lands, was disapproved. There is but one inference, and that is that the construction placed upon these acts by the Interior Department was in accord with the actual intent of Congress.

Attention is here called to the act of Congress approved February 26, 1895, 28 Stat. 683, which provided for the appointment of special commissioners to act under the jurisdiction of the Secretary of the Interior, with authority to conduct hearings and adjudicate what lands within the Northern Pacific grant in the States of Montana and Idaho were mineral in character. Congress would not have enacted this law had it understood that the Interior Department was already under a duty to inquire into and adjudicate the character of the lands claimed under this grant before issuing patents. Moreover, this act was passed shortly after the decision in the Barden case, which, as stated above, held that when there was no actual examination or adjudication as to the character of the lands, an exception of mineral lands should be inserted in the patents.

The railroad companies, including the Southern Pacific Railroad Company, have acquiesced in this

construction of the granting act by the Interior Department.

As heretofore stated, the form of the patent issued under these railroad grants was acquiesced in by the railroad companies. Patents in that form were issued uniformly from the beginning of the administration of these grants until the year 1904. The Government will show at the proper time that the railroad companies not only accepted these patents as a correct definition of the title, and caused them to be placed of record in the counties where the lands were situated, but that in making sales of these granted lands, the railroad companies, and particularly the Southern Pacific Railroad Company, recognized the validity of the exception in the patents by inserting in the deeds executed to the purchasers a similar exception of mineral lands in favor of the United States; that this practice was followed without deviation until the year 1904, and that thousands of these deeds, executed by the Southern Pacific Railroad Company, were recorded in the counties wherein the granted lands are situated.

It also expects to prove the following: That in 1886 the Commissioner of the General Land Office returned several lists of selections that had been filed by the Southern Pacific Railroad Company and required that they be supported by the affidavit of some person or persons having personal knowledge of the facts, proving the nonmineral character of

each forty-acre tract of land contained in such lists with the same degree of particularity and certainty as was required in the case of homestead entries. This was required so that the department could determine whether the lands were mineral. The Southern Pacific Railroad Company declined to comply with this requirement. Under instructions from the Commissioner of the General Land Office the lists and selections were disapproved by the local land officers. The Southern Pacific Railroad Company appealed from this decision, and the decision was sustained and the requirement insisted upon. The railroad company still declined to furnish the proof required. The issuance of patents was suspended from 1886 to 1891. Finally the Department of the Interior acquiesced in the position taken by the Southern Pacific Railroad Company, and the issuance of patents was resumed, without proof or adjudication as to the non-mineral character of the lands, and an exception of mineral lands was inserted in the patents and the patents were accepted. It was under these circumstances that the patent dated July 10, 1894, involved in the case at bar, was issued.

Even if it were to be conceded that the exception was not authorized by law, it could not be treated as void and nugatory without ignoring entirely the character and function of a patent as an instrument of conveyance. A patent, like a deed, can convey only that which it purports to convey; and it strikes us as almost absurd to argue that such an instrument will operate to pass the title to lands which, by its

own express terms, are excluded from the premises granted. The rule is well established and elementary that such an exception is part of the description, and the instrument containing it is not to be treated as conveying, or in any wise affecting, the land excepted. This is the view adopted by the Supreme Court of California in respect of railway patents like the one involved in the present case. (*McLaughlin* v. *Powell*, 50 Cal., 64; *Chicago Quartz Mining Co.* v. *Oliver*, 75 Cal., 194; *Van Ness* v. *Rooney*, 160 Cal., 131.)

See also *Leavenworth, &c., R. Co.* v. *United States*, 92 U. S., 746.

It matters not whether the patent be regarded in this instance as conveying the title, or as merely confirming the title already conveyed by the granting act. The principle is the same in either event: The *juristic operation* of the patent as a conveyance, whether original or confirmatory, is to be gathered from its terms, and not to be imported into it by a fiction which flatly contradicts its declarations.

One more suggestion before leaving this question. If the exception were "void" for all other purposes, it must, as a matter of common sense, be accepted as conclusive *evidence* that the question of mineral character was never passed upon by the department. If it was the duty of the department at all events to issue an absolute patent or none (which we deny), it was clearly the duty of the department to inquire very carefully into and determine the question of character before it proceeded further. The excep-

tion then would demonstrate that the patent was void, because issued in violation of legal duty—a conclusion which, in view of the lapse of time and the statute of limitations, would doubtless be welcomed by the railroad company.

The Government contends that the third question certified to this court should be answered in the negative.

FOURTH QUESTION.

If the reservation of mineral lands as expressed in the patent is void, then is the patent upon a collateral attack a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?

This question is closely related to the second question. The general doctrine that the issuance of a patent, based upon an entry under one of the general public land laws, raises a conclusive presumption of the existence of all of the facts necessary to authorize the issuance of the patent, is sometimes stated by the courts to the effect that the issuance of the patent constitutes a conclusive adjudication, sometimes that it constitutes a conclusive official declaration, and in some instances the courts have stated that it constitutes both a conclusive adjudication and a conclusive official declaration. Apparently this fourth question was certified to the court because of this condition of the authorities.

It is submitted that if the second question be answered in the negative, and it be held that the patent does not have the effect of a conclusive adjudication, for the same reasons it must be held that it does not have the effect of a conclusive declaration on behalf of the United States. In fact, the reasons would be more controlling as to the fourth question than as to the second. A judgment or adjudication necessarily operates by way of estoppel, while a declaration operates as an estoppel only when the other elements of estoppel are present. There is nothing in the record, or in the facts certified to this court, which establishes an estoppel against the United States unless it be upon the theory of *res adjudicata*, which is covered by the second question.

The patent contains no express declaration as to the character of the lands described therein. It can be treated as a declaration that the lands are nonmineral only by implication, at the most. And even if so considered, it would not be conclusive, for the reason that the facts certified to this court do not create an estoppel. It follows that even if an implication of a declaration that the lands are nonmineral could be indulged, this implication would not be conclusive, but would be rebuttable, and the Government asserts that when the entire record relating to the issuance of the patent is before the court, it will appear beyond doubt that the patent does not constitute a declaration on the part of the United States as to the character of the land. On the con-

trary, the proceedings show that the United States, speaking through its officers, expressly declined to make any such declaration.

It is submitted that under no theory can the issuance of the patent be treated as any declaration on the part of the United States as to the character of the lands, much less a conclusive declaration, and therefore the fourth question certified to this court should be answered in the negative.

FIFTH QUESTION.

Is petroleum or mineral oil within the meaning of the term "mineral" as it was used in said acts of Congress reserving mineral lands from the railroad grants?

The terms of the act of July 27, 1866, the rulings of the Interior Department, the decisions of this court, and the general legislation of Congress upon the subject leave no doubt that this question should be answered in the affirmative.

1. The excepting clause of the act of July 27, 1866, provides that "all mineral lands" are excepted. Congress then provided "that the word 'mineral' when it occurs in this act shall not be held to include iron and coal." Under familiar rules of statutory construction, it is not within the province of the court to say that Congress meant "coal, iron, and petroleum." The meaning of Congress is unequivocally expressed, and there is no ground for statutory construction. Congress having specified

the minerals which should not be included within the term "mineral" as used in the act, the court has no authority to extend the list.

2. The rulings of the Land Department have been almost uniformly to the effect that petroleum is a mineral within the meaning of all public-land laws. An apparent diversity of opinion arose because of the decision of Secretary Smith, rendered on August 27, 1896, and reported in 23 L. D. 222. In that decision it was held that although petroleum is a mineral, nevertheless petroleum-bearing lands did not come within the purview of the mineral-land laws of the United States or within the exception of mineral lands contained in the Southern Pacific grant of March 3, 1871. But this decision was reviewed by Acting Secretary Ryan on November 6, 1897, reported in 25 L. D. 351. The decision upon the rehearing was written, or at least supervised and approved, by Justice Van Devanter, then Assistant Attorney General for the Interior Department. The former decision of Secretary Smith was reversed, and, after an exhaustive discussion of the subject, it was held that petroleum-bearing lands come within the exception of mineral lands contained in the Southern Pacific grant of March 3, 1871, and the exception of mineral lands in that grant is identical with the exception in the grant of July 27, 1866, involved in the case at bar.

In *Gird et al.* v. *California Oil Company*, decided February 26, 1894, by Judge Ross, acting for the

United States Circuit Court for the Southern District of California, 60 Fed. 531, it was held that petroleum-bearing lands are mineral lands, and as such are excepted from railroad grants and can be acquired only under the mining laws relating to placer claims. This was one of the authorities relied upon in support of the decision of Acting Secretary Ryan above cited.

In *Northern Pacific Railway* v. *Soderberg*, 188 U. S. 526, 534, this court approved this ruling of Acting Secretary Ryan. The ruling is not cited specifically, but it is apparent from the opinion of this court that it was considered and approved.

3. Beginning with 1873, it was held by successive Secretaries of the Interior that petroleum bearing lands come within the purview of the mineral land laws enacted by the act of May 10, 1872, and subsequent mineral land laws. Shortly after the decision of Secretary Smith was rendered on August 27, 1896, the subject was considered by Congress, and resulted in the passage of the act of February 11, 1897, 29 Stat. 526, which provided that petroleum bearing lands should be subject to location and entry as mineral lands under the placer mining laws. The reports of the committees and debates of Congress relating to this act show that the act was not intended to establish any new law upon the subject, but to restore and approve the former practice of the Interior Department in treating petroleum bearing lands as mineral lands, and also to disapprove the decision of Secretary Smith. See the decision of

Acting Secretary Ryan above referred to, wherein, after reviewing the history of this enactment, it is said (p. 356):

> This legislative action, so promptly taken after the departure from the earlier rulings and the long-established practice thereunder, is significant, and can hardly be considered as less than a disapproval by Congress of the changed ruling.

4. The decision of this court in *Northern Pacific Railway* v. *Soderberg, supra*, held that mineral exceptions in railroad grants shall be strictly enforced, and in that case the court held that building stone was mineral within the meaning of the exception of mineral lands contained in the Northern Pacific grant. The court defined the general scope of this exception of mineral lands as follows:

> We are of opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture (p. 536).

Petroleum clearly comes within this general definition, and at page 534 of the opinion the Court mentions petroleum as one of the minerals that come within this exception of mineral lands inserted in railroad grants.

5. There is no reason to believe that Congress did not intend to include petroleum in the exception of mineral lands. But if there should be any doubt upon the question, that doubt should be resolved in favor of the public. The doctrine that public grants shall be strictly construed, in favor of the public and against the grantee, is applicable in determining what minerals come within the exception of mineral lands inserted in railroad grants. This was expressly held in *Northern Pacific Railway* v. *Soderberg*, *supra* (p. 534), and in the prior decision in *Barden* v. *Northern Pacific*, *supra* (p. 325).

6. The decisions of the State courts, and particularly the courts of Pennsylvania, which may be cited by counsel for the railroad company upon this question, can not be accepted as authority. In the first place there is a diversity of opinion which can not be reconciled. In the second place these decisions concede that petroleum is a mineral, and the most that any of them holds is that, under certain contracts between private contracting parties, petroleum was not within the contemplation of the parties. These decisions throw no light upon the intent of an exception of mineral lands inserted in a railroad grant. This view of the State authorities was expressed in the decision of Acting Secretary Ryan, *supra*.

SIXTH QUESTION.

Does the fact that the appellant was not in privity with the Government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error, or irregularity in the issuance thereof as so alleged in the bill?

This question relates essentially to the rights of the appellants, and not to any right of the United States.

It can not be contended, however, that an attempt to enforce an exception of mineral lands, which appears both in the grant and in the patent, is an attack upon the patent. It is an effort to uphold the patent in its terms. The question as framed gives the impression that an effort is here being made to regain something which has been taken from the Governmend by fraud or error, whereas the effort is merely to retain and enjoy that which has never passed from the Government either by grant or by patent.

SEVENTH QUESTION.

If the mineral-exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?

The acceptance of the patent in its present form was the voluntary act of the grantee. The record shows that the grantee agreed to take it and be bound by it. (R., 2.) In this there was not only a mutual interpretation of the original grant, and an agreement between the parties that the exception should be effective, but there was also such conduct as must clearly estop the grantee to question the exception, now that the time within which the patent may be corrected has presumably gone by. At the proper time the Government will endeavor to show that for forty years it has issued its patents without examination of the land, relying on the exception and that for the same length of time the company has accepted the patents without protest, and the Government has been lulled into security by the apparent acquiescence of the company. It has been made apparent that from the very start the Land Department was issuing these patents in the belief

that the Government was adequately protected by the exception, and that it was thereby enabled quickly to issue patents which otherwise would be interminably delayed. It is now too late for the grantee to proclaim its intention to contest the validity of the exception and thus to acquire a vast area of rich lands to which it has color of claim only through the medium of its silence and acquiescence in the exception in the patent. To permit it to do so would be to uphold it in the perpetration of a gross fraud upon the United States. This court has suggested that such course could not be effectively pursued by a grantee. This is to be noticed in the quotation heretofore made from *Reynolds* v. *Iron Silver Mining Co.*, 116 U. S., 687,697.

> "Without deciding on the effect of the acceptance without protest of a patent with such exceptions in the granting clause," etc.

It is very apparent that the decision in the much cited case of *Shaw* v. *Kellogg* largely hinged upon the *bona fide* but unsuccessful efforts which the grantees in that case made to have their grant confirmed by the issuance of a patent of such nature as to settle the mineral or nonmineral character of the grant.

It is submitted that the railroad is not in a proper position to urge the supposed mistake of the Land Department to its own advantage, and to the detriment of the United States.

CONCLUSION.

In conclusion, we can not express the situation more forcibly than in the words of the closing paragraphs of *Barden* v. *Northern Pacific* (p. 331):

> An affirmance of the judgment in this case would enlarge the grant of the government against its oft-repeated exception of mineral lands and give to the plaintiff the vast mineral wealth of the States through which the grant passes. * * * And, as counsel justly observes, the same rule would apply to all our transcontinental railroads and give to them nearly all our mineral lands, when Congress has time and again declared that they should have no mineral lands, and that no act of Congress should be construed to give them any; and that they "in all cases shall be and are reserved exclusively to the United States unless otherwise specially provided in the act or acts making the grant."

Respectfully submitted.

WM. MARSHALL BULLITT,
Solicitor General.

ERNEST KNAEBEL,
Assistant Attorney General

B. D. TOWNSEND,
Special Assistant to the Attorney General.

DECEMBER, 1912.

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

EDMUND BURKE, APPELLANT,
v.
SOUTHERN PACIFIC RAILROAD COMPANY and Kern Trading & Oil Company. — No. 279.

J. I. LAMPRECHT AND F. M. AIKEN, Trustees, appellants,
v.
SOUTHERN PACIFIC RAILROAD COMPANY and Kern Trading & Oil Company. — No. 280.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL MEMORANDUM ON BEHALF OF THE UNITED STATES.

Now comes the Solicitor General, and by leave of court respectfully represents:

This cause was heard during the October, 1912, term upon seven questions of law certified by the Circuit Court of Appeals for the Ninth Circuit.

17329—13——1

The fifth question is as follows:

> Is petroleum or mineral oil within the meaning of the term "mineral" as it was used in said acts of Congress reserving mineral lands from the railroad land grants?

In the oral argument and in the several briefs submitted to the court, including a brief filed by the United States, this question was treated as a question of law. Subsequently a supplemental memorandum was filed by the Southern Pacific Railroad Company and Kern Trading & Oil Company relating solely to the fifth question and containing an appendix, prepared by one E. T. Dumble, a geologist in the employ of the Southern Pacific Company, designed to establish the proposition that petroleum is not a mineral in the view of the scientist. This appendix dwells insistently upon the organic origin of petroleum and upon the organic processes of decomposition and putrefaction through the aid of micro-organisms to which the original vegetable or animal substances, of which petroleum may be said to be the ultimate (though not the immediate) derivative, have been subjected; and the entire trend of its argument, assisted by the manner in which it selects and concatenates definitions and excerpts from the writings of scientific authorities, is to make prominent the organic nature of the original substances and the organic character of the first processes of transformation, so as to induce in the reader's mind the idea that

the product itself must also be organic and consequently nonmineral.

Its author cites and discusses the opinions and writings of some scientists and a few selected definitions from well-known lexicographers. Among the scientists whose works are cited are David White and F. W. Clarke, Chief Geologist and Chief Chemist, respectively, of the United States Geological Survey.

In his conclusion he says:

> The United States Geological Survey apparently treats petroleum as a mineral in their annual publication, Mineral Resources of the United States, but against this we have the statements of the members of the survey that it is an organic substance, and therefore can not be a mineral. (Appendix, p. xxvii.)

The purpose of this is apparent. Beginning with the year 1884 the United States Geological Survey has issued an annual publication concerning the mineral resources of the United States. In each issue of that publication petroleum has been uniformly included as one of the important mineral products of the United States. To meet this, the author of the appendix attempts to show that the two members of the Geological Survey, above referred to, have, in scientific writings, expressed the opinion that petroleum "is an organic substance, and therefore can not be a mineral."

At page 23 of the supplemental memorandum counsel for respondents invite the attention of the court to the pendency in the Federal courts of California of suits between the Government and the Southern Pacific Railroad Company involving the question whether petroleum is a mineral within the meaning of the exception of mineral lands inserted in the Southern Pacific Railroad grant, and state that testimony "is now taken, or is about to be taken, by the lower court upon this question."

In one of the suits thus referred to by counsel for respondents, testimony was taken by the Government at Washington, D. C., during the month of September, 1913. Among the witnesses who testified were a number of the members of the Geological Survey, including the Messrs. White and Clarke above mentioned. During the examination of Mr. White, on September 18, 1913, his attention was directed to this appendix, signed by E. T. Dumble, and particularly to certain passages on pages xvi and xvii purporting to be consecutive matter quoted from a scientific paper contributed by the witness to the June-July, 1908, number of Economic Geology, entitled "Some Problems in the Formation of Coal."

Mr. White testified that the matter so quoted was made up of selected paragraphs taken wholly from the first part of his discussion of the subject, some of which had been abridged in matters of substance, while others were transposed out of order in such wise as to pervert the meaning originally intended;

that an understanding of his entire paper would necessarily contract the proposition contended for by the quoter; and that even the matter quoted, if left unabridged and reproduced in natural order, would serve to destroy the contention that petroleum as obtained from the earth is an organic substance, but would establish that it is an inorganic substance derived by the action of inorganic processes on organic matter. Subsequent investigation of the matter quoted from Mr. F. W. Clarke disclosed similar liberties taken with the text of Mr. Clarke's "Data of Geochemistry" (Bulletin 491, United States Geological Survey).

Unmarked omissions and unindicated transpositions constitute the errors in quoting from these two authorities. Mr. White's paper, when carefully studied, indicates the essentially inorganic nature of both coal and oil and shows that geodynamic earth processes have played a necessary part in their formation. With regard to Dr. Clarke's paper, the conditions are similar. It certainly is not the fact, as implied by Mr. Dumble, that these papers either state or infer that petroleum is an organic substance and therefore can not be a mineral, nor does Mr. Dumble anywhere quote from any other paper by a member of the Geological Survey which so states or infers.

The White paper occupies pages 292 to 318 of the June–July number of "Economic Geology." It relates to coal primarily, but incidentally and inferentially to oil. The discussion of coal forma-

tion, and incidentally and inferentially of oil formation, recognizes two stages in the transformation from the organic to the inorganic; first a stage during which accumulations of organic débris are acted on and altered by organic processes—namely, by decomposition and putrefaction due to microorganisms—and second, a stage involving further and fundamental alterations through the agency of forces wholly inorganic, operating in the bowels of the earth, the cooperating forces of chemical affinity, heat, pressure, etc.

At page 311 of his paper, in closing the discussion of the first or organic stage, Mr. White says:

> In the preceding pages attention has been confined mainly to the initial stage of coalification, *i. e.*, the decomposition of the organic matter through the agency of microorganisms, among which the anaerobic bacteria are primarily indispensable. This process, which is essentially *biochemical* (organic), probably leads no further than the formation of peats, humus, recent sapropelic deposits, humic concentrates, etc. It remains to consider the second, or dynamochemical (inorganic) stage of coalification—the transformation, as the direct or indirect result of dynamic influences, of the coalifying material into lignite "bituminous" (humic) coals, anthracite, etc.
>
> NOTE.—The words "organic" and "inorganic" inclosed in parentheses in this quotation are inserted by the writer of this memorandum.

Reading this quotation and the matter following on pages 312 to 318 in connection with the paper as a whole, it seems entirely manifest that in the author's opinion the bitumens, including both coal and petroleum, regardless of the character of the matter from which they are originally derived, are in the end the products of inorganic geochemical and geophysical forces. Quotations, therefore, which fail to direct the attention to the final or *inorganic* stage of the process, but which are confined solely to the author's discussion of the initial or *organic* stage, are signally misleading. The entire matter quoted in the Dumble appendix is from the discussion of the first stage found in the pages preceding page 311 of the original paper, and no part of it is taken from any portion of the discussion of the second stage.

The first three paragraphs on page xvi of the appendix are found on pages 304 and 305 of the original, while the succeeding paragraphs are taken from the pages preceding, *i. e.*, from pages 297, 298, and 299, respectively, of the original, the true meaning of which is by no means elucidated by the process of inversion, which is nowhere indicated in the copy. The borrower of these quotations also passed over a significant paragraph almost immediately preceding the one he first selected, viz (p. 303):

> The ordinary process of coalification of an accumulation of organic débris embraces two stages of prime importance: (*a*) The

putrefaction stage which is, at least dominantly, biochemical; and (*b*) the alteration or metamorphic stage, which is dynamo chemical, being induced and regulated, in the main, by geodynamic influences. The latter embraces phenomena ranging from pressure-dehydration and lithification, to graphitization.

Thus, even in his discussion of the initial or *organic* state of the process, Mr. White outlines clearly the second or *inorganic* stage of dynamo-chemical alteration.

Again, the appendix vouchsafes no indication of a certain important omission of substance occurring after the fifth quoted paragraph on page xvii, viz (from White, p. 298):

> The discovery of hydrocarbon-bearing strata composed largely of such organisms in rocks as old as the Ordovician strongly suggests an algal origin for the graphites interbedded in still older metamorphic sediments of the Laurentian or Algonkian.

Here Mr. White suggests the metamorphism induced by purely *inorganic* agencies, by which a substance of admittedly *organic* origin (algæ or seaweeds) has been transformed into a well-recognized mineral substance — indeed, a mineral species (graphite). The entire paragraph as it appears intact in the original here follows, the part omitted in the appendix being printed in italics:

> *The discovery of hydrocarbon-bearing strata composed largely of such organisms in*

rocks as old as the Ordovician strongly suggests an algal origin for the graphites interbedded in still older metamorphic sediments of the Laurentian or Algonkian. The question of the part played by algæ in the genesis of petroleums was meanwhile being considered independently by Potonie, whose conclusions, appearing almost simultaneously, are substantially the same. This able German paleobotanist, who now has devoted much research and discussion to the subject, applies the term " Sapropel " to the accumulating residuum of the gelatinous or fatty algæ mingled with more or less animal matter partially decomposed or putrefied in stagnant or quiet water.

It will be seen that the part of this paragraph excerpted by Mr. Dumble has to do with the original organic matter only, while the part left out reveals Mr. White's opinion that such matter, when acted on by earth forces, may be metamorphosed into the specific mineral, graphite. As the result of similar selections and omissions the tendency of the quotations in the appendix is to give the impression that White wrote only of the organic phases in the evolution of petroleum and to instill the belief that he regards petroleum as wholly organic both in origin and in mode of derivation. This is wholly fallacious.

On pages xviii, xix, and xx the appendix quotes liberally from Mr. Clarke's work on the " Data of Geochemistry," as a basis for claiming support from that work for the proposition that petroleum is an

organic substance and, therefore, a nonmineral substance. The first and second paragraphs on page xviii are but parts of a paragraph found at page 697 of the original. The paragraph as a whole is as follows:

> From data of this kind, and from the experiments cited in the preceding section of this chapter, it is evident that hydrocarbons analogous to natural gas, petroleum, and asphalt may be derived either from animal or vegetable matter, or from both. This, I think, admits of no dispute, but argument is possible relative to the genesis of the larger accumulations of mineral oil. (Engler's researches have led to a widespread belief in the animal origin of petroleum, although the details of the transformation process are very diversely interpreted. Engler himself ascribes the derivation of petroleum from animal remains to a putrefactive process, which removes the nitrogen compounds. *The fats remain, to be altered by heat and pressure into hydrocarbons, whose boiling points lie below 300; and these later undergo a partial autopolymerization into denser forms.* How far such a polymerization may be possible, if indeed it is possible at all, is a matter of uncertainty. C. F. Mabery holds that the changes are always in the opposite direction and that the more complex hydrocarbons are formed first, partially breaking down afterward into lower members of the series. J. Marcusson holds the same view. The putrefactive removal of the albuminoid

substances is also to be questioned, and it is certainly not universal.) The nitrogen bases of California petroleum furnish perhaps the strongest evidence that the proteids contribute their share to the make-up of petroleum, and show also these particular oils are of animal origin.

The matter above included within parentheses is omitted by the appendix. The rest is quoted in the appendix without employing any sign to indicate the omission. By this process of exclusion the parts that refer to the organic nature of the primary substances are brought forward, and those which relate to the inorganic processes of metamorphosis are suppressed. The result is to convey a false impression of Clarke's attitude toward the problem as a whole, and this is true in spite of the fact that the parts excluded consisted in the interpretation of the views of other scientists.

In the original, at page 700, Mr. Clarke says:

> Data of this class might be multiplied almost indefinitely. For instance, C. E. Bertrand and B. Renault have shown that Boghead mineral, torbanite, and kerosene shale, from which oils are distilled, are derived from gelatinous algae, whose remains are embedded in what was once a brown, humic jelly. *This observation may be correlated with the views advanced by J. S. Newberry and S. F. Peckham, who regard the liquid petroleums as natural distillates from carbonaceous deposits, which latter were laid down at depths below the horizons where the*

> *oil is now found. The heat generated during the metamorphism is supposed to be the dynamic agent in this process, although many productive regions show no evidence that any violent metamorphoses have ever occurred.*

The first two sentences are quoted in the appendix at pages xix and xx; the sentences which we have italicized are omitted.

It is true that the views of Newberry and Peckham are referred to in the appendix (xi–xiii) as also the views of Engler (ib., xv). The views of Clarke, however, are not fairly revealed by the peculiar eclectic method pursued by Mr. Dumble.

At page xxi of the appendix the author, in contending that petroleum is an organic substance, observes:

> This has also been proven beyond dispute by the optical activity of petroleums, since only organic oils possess such quality. (Clarke, p. 702.)

An examination of page 702 of Clarke's "Data of Geochemistry" fails utterly to support any such statement. Neither on that page nor elsewhere does Mr. Clarke use the expression "organic oils." The transposition of his reference to oil of "organic origin" into the expression "organic oils" is not justified at any point by Mr. Clarke nor by any authority mentioned in the appendix; neither does the most liberal construction of any authority cited in the appendix justify in the slightest degree the

further statement on page xxi that "even those who held strongly for its (petroleum) derivation from chemical reaction in which mineral matters were involved, recognized the resultant as an organic substance."

It is not our object to reflect upon the author of the appendix, much less upon the distinguished and high-minded lawyer (now, unhappily, passed away), or his associate counsel, whose names are signed to the supplemental memorandum. We are told by present counsel for the Southern Pacific interests that the appendix was prepared by Mr. Dumble without knowledge that it was to be published or presented to this court, and that there was a misunderstanding in this regard upon the part of Mr. Evarts. This explanation we gladly accept. The facts remain, however, that the appendix has been printed and filed, and that it is misleading. It claims to reflect the views of experts in the Geological Survey, to the effect that petroleum "is an organic substance, and, therefore, can not be a mineral" (p. xxvii). We are satisfied that this is wholly incorrect, and that a careful study of the papers cited will establish the fallacy. There are few scientists who deny the organic *origin* of petroleum and none of repute who deny the organic *origin* of coal. It is therefore entirely beside the mark to quote, as the appendix does, copiously, from the White and Clarke papers to the effect that coal and oil are organic in origin. Both White and

Clarke admit this—in fact, are positive in their views as to all coal and most oil; but neither White nor Clarke, nor, we think, any other member of the Survey, believes that because these substances are derived from organic materials they are now organic substances and therefore not mineral substances. It should be noted that practically all the authors quoted by Mr. Dumble recognize the distillation or transformation (inorganic) process in converting the organic substance into petroleum. The geodynamic processes to which the original organic materials have been subjected have resulted in new products which are inorganic. Scientific experiments and common commercial practice have shown that it is impossible to subject animal, vegetable, or mineral oils to distillation without breaking down the oils into new and different compounds. There is no question that the petroleum obtained from the earth is a different chemical compound from the organic substance from which it originated. In fact the transformation is more complete in petroleum than in coal, for the latter may retain some of its original constituent compounds. We believe that these propositions rest upon a firm basis of scientific authority. The assumption that an inorganic process transforms an organic substance into another of organic nature seems not worthy of serious consideration. These inorganic processes are primarily heat and pressure, it is true, but they are natural processes carried on in the earth's crust beyond the control of

man and without his intervention. The fact that man can in a measure produce the same results does not affect the conclusion. Man by the application of heat and pressure can produce diamonds from organic materials. Yet no one because of that fact would contend that diamonds formed by heat and pressure in the earth's crust are not mineral.

In order to understand the question thoroughly it is necessary to recognize clearly the distinction between an organic substance and a substance of organic origin. The fact that a substance was originally organic does not mean that it is now an organic substance. Vegetable and animal tissues are organic substances. Substances which were once vegetable and animal tissues but have since been transformed into new chemical products by inorganic agencies are no longer organic substances, but have become inorganic substances of organic origin. Thus wood is an organic substance, while graphite, many if not most limestones, probably some diamonds, and others are inorganic substances of organic origin. No one would seriously contend that these latter are now organic substances or would deny their mineral character, yet they were originally vegetable or animal matter, or both.

A consultation of the originals, it is believed, will show that Mr. Dumble's method of dealing with some of the other authorities cited is similar to the method employed in the cases of Messrs. White and Clarke. We do not, however, feel at

liberty to do more in this regard than to make the suggestion to the court and to call attention particularly to one more illustration. In support of the proposition that petroleum is not mineral, the appendix gives certain definitions on pages xxiv and xxv, including definitions from the "System of Mineralogy," the standard treatise of E. S. Dana. Undoubtedly these quotations go to show that petroleum is not "a mineral" in the sense of being a definite mineral species. To constitute a mineral species there must be a definite chemical composition and a certain characteristic molecular structure revealed in peculiar crystallization and in other physical ways; but it does not, of course, follow that because a natural substance fails to meet these requirements it must necessarily be a nonmineral substance. The chemical and physical properties of petroleum are simply so indefinite or variable that they do not conform to the rigid requirements of the science of pure mineralogy, which will not admit into its categories as a mineral *species* a substance which, chemically and physically, is not definite and one and the same wherever occurring. It is significant, however, that the hydrocarbons petroleum, asphalt, and coal are classified and described in the appendix of Dana's "System," pages 1015 *et seq.* Of these substances Dana says (p. 1015):

> The substances included here are: 1, Petroleum, passing into the viscid bitumen, maltha or mineral tar; 2, the solid bitumen

asphaltum; 3, mineral coal. These are in general more complex substances than those included in the preceding pages and have still less claim to be regarded as definite mineral species (*though it may be a matter of convenience in many cases to have the different kinds provided with names*). *It is hence not unnatural to separate them from the somewhat more definite substances previously described in this chapter, although no line can be drawn between them, and the division must be made somewhat arbitrarily. In fact, it may be noted that even some of the substances ordinarily classed as coals, in behavior toward solvents and in composition, approach closely to hydrocarbons already mentioned.* (*cf. torbanite,* pp. 1009, 1022.)

The part of this paragraph which is italicized was omitted from the quotation given on page xxv of the Dumble appendix.

Dana evidently considered these substances as mineral, otherwise he would not have devoted to them some ten pages of his treatise on minerals (*loc. cit.*, pp. 1015–1024).

JOHN W. DAVIS,
Solicitor General.

DECEMBER, 1913.

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Office Supreme Court, U. S.
FILED.
JUL 30 1912
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. ~~662~~. 279

EDMUND BURKE, APPELLANT,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY (A CORPORATION), AND THE KERN TRADING AND OIL COMPANY (A CORPORATION), APPELLEES.

No. ~~663~~. 280

J. I. LAMPRECHT AND F. M. AIKEN, TRUSTEES, APPELLANTS,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY (A CORPORATION), THE KERN TRADING AND OIL COMPANY (A CORPORATION), AND T. S. MINOT, APPELLEES.

PETITION OF APPELLEES FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MAXWELL EVARTS,
Attorney for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 682.

EDMUND BURKE, APPELLANT,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY (A CORPORATION), AND THE KERN TRADING AND OIL COMPANY (A CORPORATION), APPELLEES.

No. 683.

J. I. LAMPRECHT AND F. M. AIKEN, TRUSTEES, APPELLANTS,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY (A CORPORATION), THE KERN TRADING AND OIL COMPANY (A CORPORATION), AND T. S. MINOT, APPELLEES.

PETITION OF APPELLEES FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The petition of The Southern Pacific Railroad Company (a corporation), The Kern Trading and Oil Company (a corporation), and T. S. Minot, appellees, respectfully shows to this honorable court as follows:

1. Appellant Edmund Burke, on October 31, 1910, filed amended bill of complaint in the Circuit Court of the United States in and for the Southern District of California, Northern Division, against The Southern Pacific Railroad Company (a corporation), and The Kern Trading and Oil Company (a corporation), and others, wherein said complainant alleged, in substance, that he was the owner and entitled to the possession of an undivided one-tenth interest in certain described sections of land listed as placer mining claims under the mining laws of the United States; that prior to July 9, 1892, all of said lands were covered by valid subsisting mining locations theretofore made by divers citizens of the United States, pursuant to the mining laws, and made after discovery of mineral in the respective claims; that on July 10, 1894, a patent, purporting to convey 3,200 acres of the lands granted to the Southern Pacific Railroad Company, including the certain lands aforesaid, under the granting act of Congress, of July 27, 1866 (*14 Stat., 292*), and joint resolution of Congress, of June 28, 1870 (*16 Stat., 382*), issued from the United States to said company and was accepted by it and recorded; that at the time thereof said lands were not public lands, but were segregated from the public domain, the beneficial title thereto being held by the mining locators, of which said railroad company had due notice; that said company caused its land agent to make a false and fraudulent affidavit and application for patent, wherein he deposed that said lands were vacant, unappropriated, and not interdicted or mineral lands; that no notice of said application was given to any of the owners of the mining locations then existing upon said land; no hearing was had concerning the character of the land or for the purpose of determining the same, and that the patent so issued to the railroad company was issued without any such investigation or determination; but said patent contained an exception and reservation in these words:

> "Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this

exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands."

The prayer of the bill was for an injunction, *pendente lite* and permanent, against defendants, and each of them, from claiming any right, title, interest, or estate in or to any of the lands mentioned, and for such other and further relief as may be just and equitable.

2. Demurrers to said amended complaint were filed by each of the appellees above named; the same came on for hearing before the court, were sustained, and said amended bill of complaint dismissed, by decree of said court duly entered on March 21, 1911; from which decree said Edmund Burke prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and the same was allowed March 22, 1911.

3. Appellants J. I. Lamprecht and F. M. Aiken, trustees, who were made parties defendant to the complaint in the suit of Edmund Burke, *supra*, filed answer to that cause, substantially admitting the allegations of the complaint, and also alleged that said railroad company, with full knowledge, did, for itself, its successors and assigns forever, accept, assent, and submit to each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, and reservations contained in the certain act and joint resolution of Congress aforesaid, and so accepting, assenting, and submitting thereto, did receive and accept the certain patent aforesaid; wherefore, said railroad company, and all others claiming under it, are bound by the certain exceptions and reservations, etc., aforesaid, and are estopped to resist or deny the binding force and effect of the same. Said answer prayed affirmative relief, substantially as prayed in said amended complaint, to which was added a prayer that the court construe and interpret the mineral exclusion clause contained in the granting acts aforesaid, as

well the mineral exclusion clause contained in the certain patent aforesaid.

And said J. I. Lamprecht and F. M. Aiken, trustees, likewise filed their certain amended cross-bill in said case, the same being, *mutatis mutandis*, substantially in the same words and praying like affirmative relief as in the answer so filed by them, as aforesaid.

4. Demurrers to said cross-bill were filed by each of the appellees above named; the same came on for hearing, along with certain other demurrers to the amended bill of complaint aforesaid, whereupon said demurrers to said cross-complaint were likewise sustained and said cross-complaint dismissed by decree entered March 21, 1911; from which decree said J. I. Lamprecht and F. M. Aiken, trustees, prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and the same was allowed June 20, 1911.

5. Subsequently, on October 16, 1911, the aforesaid causes came on for hearing in regular order before the United States Circuit Court of Appeals for the Ninth Circuit, and were thereupon argued and heard together and submitted.

6. That on or about the 18th day of March, 1912, the said United States Circuit Court of Appeals for the Ninth Circuit certified to this honorable court certain questions or propositions concerning which the said Circuit Court of Appeals desired the instruction of this honorable court for its proper decision.

7. That among the questions so certified (seven in number) are the following:

> "Fifth. Is petroleum or mineral oil within the meaning of the term mineral as it was used in said acts of Congress reserving mineral land from the railroad land grants?
>
> * * * * * * *

"Seventh. If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?"

8. That the certain question *fifth* aforesaid, namely, whether petroleum or mineral oil is within the term "mineral" as it was used in said acts of Congress reserving mineral land from the railroad land grants, presents for the determination of this court a question of fact, and not a question or proposition of law; but in the absence of any evidence touching said question there is nothing upon which this court can properly determine such mere question of fact.

Furthermore, petitioners show that the record in said causes, if considered in connection with the question so certified, as below prayed, will disclose that there is nothing therein contained upon which said question of fact can be properly determined, the causes having been heard and decided upon complaint, cross-complaint, and demurrers to each. Said complaint and cross-complaint abound in allegation that the lands are valuable for mineral, using that term in the abstract, without specifying the particular kind or kinds of mineral supposed to be contained therein, except in one place in the charging part of the complaint (paragraph 21), wherein it is alleged that said lands, previous to March, 1909, were formally designated by the Department of the Interior, after complete and thorough geological examination, to be lands bearing petroleum in commercial quantities. Said question was not discussed in the briefs nor was it argued before said Circuit Court of Appeals.

9. That the certain question *seventh* aforesaid, namely, whether, in the event the mineral exception clause was inserted in the patent with the consent of said railroad company, and under an understanding and agreement between it and the officers of the Department of the Interior that said clause should be effective to keep title in the United States to such of the lands so patented as were, in fact, mineral, are the defendants now estopped to deny the validity of said clause?

No allegation is made or contained in either complaint or in either record that in any way justifies or warrants the submission of said question; it is entirely and absolutely outside of the record in each said case. It asks this court, upon an assumed (as well unwarranted and unfounded) premise of fact, to find a legal conclusion based thereon—a mere moot question, not supported by the record in either case and not accurate in point of fact.

10. Petitioners are advised that this court should not be asked to pass upon the question of fact embraced in said *fifth* question, *supra*, in the absence of any evidence touching the fact so inquired about, and, furthermore, they are advised that, under the act of Congress in such case made and provided, only questions or propositions of law are authorized to be certified to this court for its proper decision; and, as to the *seventh* question, *supra*, that this court should not be asked to pass upon the same, for the reason that the premise of fact assumed therein, upon which the question itself is based, is not based upon anything appearing in or justified by the record in either said case.

It is, however, obvious that if the certain questions aforesaid are not justified by the records, the only way to determine the causes is for this court to direct the whole records to be sent up to it.

Wherefore your petitioners respectfully pray that the writ of certiorari may issue, under the seal of this court,

directed to the United States Circuit Court of Appeals for the Ninth Circuit, directing and requiring said court to certify and send up to this court for its consideration, on a date certain to be designated therein, the whole records and causes, and a full and complete transcript of all and every part of the record and proceedings of the said Circuit Court of Appeals in the said cases therein entitled Edmund. Burke, appellant, *versus* The Southern Pacific Railroad Company (a corporation), and The Kern Trading and Oil Company (a corporation), appellees, No. 1981, and J. I. Lamprecht and F. M. Aiken, trustees, appellants, *versus* The Southern Pacific Railroad Company (a corporation), The Kern Trading and Oil Company (a corporation), and T. S. Minot, appellees, No. 2028, remaining on file in the office of the clerk of the said court, and not embodied in the transcript already filed in this court as the record in the certain causes aforesaid; and that, thereupon, the certain transcript of the record in each said case sent up to this court along with the certain certificate hereinabove referred to, but which said transcripts of record are not in said certificate made to be a part thereof, may be taken and deemed to be the return by said Circuit Court of Appeals to said writ of certiorari; to the end that this court shall decide the whole matter in controversy in the same manner as if it had been brought here for review by appeal, as provided in section 239 of the act of Congress entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911 (*36 Stats., pt. 1, p. 1087*), and that your petitioners may have such other or further relief or remedy in the premises as this court may deem appropriate and in conformity with the said act.

Your petitioners request that the certified copy of the entire records in each said case, so now on file in the clerk's office of this court, as hereinabove stated, may be taken as and deemed to be compliance by petitioners with the provisions and requirements of Rule 37, subparagraph 3, of the rules of this court.

And your petitioners will ever pray.

MAXWELL EVARTS,
Attorney for Petitioners.

NEW YORK CITY, N. Y., *July* 12, 1912.

To

EDMUND BURKE, Esq.,
Appellant, No. 682, (*in propria persona*),
616-617 *Central Building, Los Angeles, California.*

D. J. HINKLEY and E. J. BLANDIN,
Attorneys for Appellants, No. 683,
1008 *Wright & Callender Building,*
Los Angeles, California.

DEAR SIRS: You will each please take notice that, upon the coming in of the Supreme Court of the United States, at the beginning of its October Term, 1912, on Monday, October 14, 1912, or as soon thereafter as counsel can be heard, petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Ninth Circuit, of which the above and foregoing is a true copy, will be presented to said Supreme Court of the United States for consideration and action.

Respectfully,

MAXWELL EVARTS,
Attorney for Petitioners.

Service of copy acknowledged this 17th day of July, 1912.

EDMUND BURKE,
Att'y in Pro. Per.
D. J. HINKLEY &
E. J. BLANDIN,
By D. J. HINKLEY.

Supreme Court, U. S.
FILED.
SEP 9 1912
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1912.

No. 279

Edmund Burke,

Appellant,

vs.

Southern Pacific Railroad Company, The Kern Trading and Oil Company,

Appellees.

Memorandum Opposing Application for Certiorari.

Edmund Burke, Attorney in Person.

Press of Stone Co., Law Printers, Los Angeles, Cal.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1912.

No. 682

Edmund Burke,
Appellant.

vs.

Southern Pacific Railroad Company, The Kern Trading and Oil Company,
Appellees.

Memorandum Opposing Certiorari.

Opposing the application for a writ of *certiorari* herein appellant contends;

I.

The petition should be denied by reason of the fact that the Circuit Court of Appeals for the Ninth Circuit being desirous of being informed concerning the law on a momentous issue saw fit to certify seven questions to this court for its de-

termination, as such determination will affect a vast acreage of claimed mineral lands and will enable the Circuit Court of Appeals to correctly apply the law relating to the validity of the insertion of the mineral exception in patents issued without an antecedent examination or determination for lands granted to railroads under the various land grant acts. It appears on the face of the certificate from the Circuit Court of Appeals, from the Ninth District, that the judges thereof are divided in opinion, that many cases await in that court the application of the law that will be laid down in this case by this court and it may properly be said in passing that a conclusive determination of such questions are of great importance to the United States whose department of justice is contending for a construction similar to that sought by the appellant. The certificate of the Circuit Court of Appeals is attached to this memorandum marked exhibit A and we submit no useful purpose will be served by sending up the record to this court—only the questions certified to this court should be passed on leaving the many other questions to the decision of the Circuit Court of Appeals.

II.

The petition of the appellees is based on their objection to the consideration by this court of the 5th and 7th questions contained in the certificate

which contains a most complete exegesis of the questions involved.

The certificate plainly shows that it was carefully considered and carefully drawn for the plain and apparent purpose of securing from this court a statement of the law so that it could be applied in the determination of the many cases pending and based on the identical questions that the appellees object to. If this case be decided on some side issue, on some tangent the purpose of the Circuit Court of Appeals will be defeated and land worth a *billion* dollars will be the subject of continuing litigation.

III.

The purpose of the questions will be seen by a glance at the certificate. The fifth question reads:

"Is petroleum or mineral oil within the meaning of the term mineral as it was used in said acts of congress reserving mineral land from the railroad land grants?"

Appellees contend that no such issue was presented to the Circuit Court of Appeals. The brief of counsel for the appellees in that court contained this statement (p. 21 of brief in Circuit Court of Appeals).

1.

"Petroleum or oil is not within the meaning of the term "mineral" as it was used in the acts of congress reserving mineral lands from railroad

land grants and oil bearing lands are not reserved from such grants.

The efforts of the complainant in this case to secure the title to the land described in the amended bill of complaint is prompted by the belief that such lands are valuable because of the petroleum or oil supposed to be contained therein. Whenever the question is presented in any case so that it may become material, we shall present to the court our views to support us in the contention that petroleum or oil is not a mineral within the meaning of the term, as it was used in the act of congress here in question. No valid reason can be suggested why, if congress intended the railroad company to have the benefit of any coal or iron lands within these limits of the grant, it should not also have the benefit of any oil or petroleum within such grant, as oil or petroleum is as essential to the business of a railroad company as coal or iron; and was not a "mineral" within the meaning of the term as it is used in the granting act.

This question, however, is not involved upon the record in the present case, because it does not appear from the amended bill of complaint as to what the character of the mineral was which it is claimed excepted the land from the grant to the railroad. All this is alleged is that prior to the issuance of the patent the lands were covered by "valid subsisting mining locations * * * after a

discovery of mineral on each of said mining claims" [Tr. p. 13, fol. 10] and that at the time of the "making of said grant and the issuance of said patent, prior thereto and ever since, said lands and sections and each legal subdivision thereof were mineral and not agricultural in their character." [Tr. p. 18, fol. 14.]

It is true that in paragraph 21 of the amended bill of complaint [Tr. p. 23, fol. 18] it is alleged that sections are mineral lands and have since July 28, 1866, been more valuable for mining than for agricultural purposes; and were, previous to March, 1909, formally designated by the Department of the Interior after complete and thorough geological examination to be lands bearing petroleum in commercial quantities, etc."

It will be seen that the railroad appellee raised the question of the mineral character of petroleum and the Circuit Court of Appeals well understanding the defenses the railroad company raised and intended to continue raising, certified the question to this court for determination as the suggested defense runs to the merits and is not a question of fact but a question of law as this court in Soderburg v. N. P. R. R. Co., 188 U. S. 526 has already, by implication at least, held that petroleum was a mineral and that petroleum bearing lands fell within the inhibition of the congressional railroad land grants which excluded mineral lands from passing to the railroad

grantees. We submit the action of the Circuit Court of Appeals should not be disturbed in such particular.

IV.

The 7th question certified to this court reads as follows:

"If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral are the defendants Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?"

The appellees contend that no allegation is contained in the record that in any way justifies the submission of such question.

The assertion of the appellees is very broad but, in fact, is unfounded.

The court will remember *that only a general demurrer* was interposed to the amended bill of complaint. *No question* as to the sufficiency of the pleading was raised by the appellees in the court below—

The bill (par. 16) alleged—

"16. Your orator further says and shows unto Your Honor that the defendant, the Southern

Pacific Railroad Company, did assent to all of the terms and conditions of said act of congress approved July 27, 1866, and the joint resolution of June 28, 1870, and they did wholly submit to and accept the terms and conditions of said acts and did agree that the Southern Pacific Railroad Company and its assigns and successors and all persons then or now in privity with it, should recognize, respect and be held by the reservation, exception and exclusion of all mineral lands contained in said grant, and that such alleged patent containing such exclusion, exception and reservation did not convey to said defendant, the Southern Pacific Railroad Company, the lands hereinbefore described or any part thereof, *and that said exception, exclusion and reservation was a term of description which was accepted by the said Southern Pacific Railroad Company at the time of the issuance of such patent.*" And in any event the question was fully presented by the allegation in the cross-bill in the suit concerning the same and the language of which is fully set out in the annexed certificate of the Circuit Court of Appeals.

The bill (paragraph 18) alleged—

"18. Further *reiterating* all the foregoing allegations, complainant alleges that said grant and patent did not convey said sections or any part thereof, and said patent to said Southern Pacific Railroad Company was issued by the United

States and accepted by the said Southern Pacific Railroad Company with said exception and reservation expressly excepting, precluding and excluding all mineral lands that might at any time be found therein and that the said Southern Pacific Railroad Company accepted the same with such exception and reservation. * * * "

Paragraph 19 of the bill alleges the acceptance and recordation of the reserved and excepted patent—

Up to the time of the application herein no objection was made to the sufficiency of the pleading and the matter constituting the 7th question *was fully argued, without objection, in the courts below.* We submit the application should be denied.

EDMUND BURKE,
Attorney in Pro. Per.

EXHIBIT A.

United States Circuit Court of Appeals for the Ninth Circuit.

Edmund Burke, appellant, vs. The Southern Pacific Railroad Company (a corporation) and The Kern Trading and Oil Company (a corporation), appellees. No. 1981.

Whereas the appellant in the above entitled cause was the complainant in the court below in a suit in equity brought against the appellees as defendants, in which he alleged, in substance, that

The Kern Trading and Oil Company, a corporation of the state of California, wholly owned, dominated, controlled and operated by the Southern Pacific Railroad Company, is the lessee of certain lands included in the land grant to the Southern Pacific Railroad Company made by congress on July 27, 1866, (14 Stats. 292), and the joint resolution of congress of date June 28, 1870 (16 Stats. 382); that the complainant, subject only to the paramount title of the United States, is the owner and entitled to the possession of an undivided one-tenth interest in certain described sections of the land so listed as placer mining claims under the mining laws of the United States; that prior to July 9, 1892, all the lands described in the bill were covered by valid subsisting mining locations made theretofore by divers citizens of the United States, pursuant to the mining laws, and made after discovery of mineral on the said respective claims, that on July 10, 1894, a patent purporting to convey 3200 acres of the lands so granted by congress to the Southern Pacific Railroad Company, including the lands in controversy herein, issued from the United States to that company and was accepted by it and recorded; that at the time of the issuance of said patent the lands embraced in the said mining claims were not public lands subject to sale and disposition but were segregated from the public domain, the beneficial title thereto being held by

the mining locators of which the said railroad company had due notice, and that having such knowledge the said railroad company did falsely and corruptly cause one Madden, its land agent, to make and he did make on May 9, 1892, a false and fraudulent affidavit and application in which he deposed that the lists of lands presented for patent are a correct list of lands inuring to the railroad company to aid in the construction of its road, and that the lands were vacant, unappropriated and not interdicted mineral or reserved lands; that no notice of said application for patent was given to any of the owners of the mining locations then existing upon said land, and no hearing was had in the land office or in the Department of the Interior concerning the character of the land or for the purpose of determining the same, and that the patent so issued to the railroad company was issued without any such investigation or determination; that the patent contained an exception and reservation which reads as follows:

"Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands," that under said patent the railroad company now claims to own each and every legal subdivision of the land described therein but that it has never been at any time in

the actual, open, peaceful, notorious, public or physical possession of any part of the same nor was it in such possession at the time of the commencement of this suit, but that the said lands have been wild, open, unoccupied, unappropriated lands free from any physical sign of any claim of domination or ownership by any of the defendants to the bill; that the said prior locators of said mining claims having failed to perform their annual labor for the year 1908, the complainant and his associates entered on said lands in March, 1909, and exercising forfeiture by reason of such failure to do such annual labor they relocated the same in accordance with the mining laws of the United States, after making due discovery of mineral upon the land covered by each location, and that prior thereto said land had been properly and legally designated by the Department of the Interior, as lands bearing mineral, to-wit, petroleum, in commercial quantities, and more valuable for mining than for agricultural purposes. The prayer of the bill was that the defendants and each of them be estopped from claiming any right, title or interest in or to any of the lands involved in the suit, that they be enjoined from interfering with the property claimed by the complainant or the minerals therein, and for such other and further relief as might be equitable.

And whereas J. I. Lamprecht, *et al.*, who were defendants to said bill, filed a cross-bill in said

cause alleging the same facts as did the complaint therein, and seeking the same relief as was prayed for in the bill and in said cross-bill did also allege as follows:

"These cross-complanants further say and show unto the court, that the said Southern Pacific Railroad Company, with full knowledge of all the facts and circumstances herein stated and alleged, did, for itself, its successors and assigns forever, accept and assent to, and submit to, and agree to be bound by each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions and reservations in said act and joint resolution, and in said patent or either or any of them contained, and so accepting the same and assenting and submitting thereto, and agreeing to be bound thereby, did receive and accept said alleged patent and cause the same to be recorded in the office of the recorder of the county of Fresno, and state of California, and that said defendant, Southern Pacific Railroad Company, and all persons claiming any interest in said lands or any part thereof, under or through it by virtue of said act of congress and joint resolution, and said patent or any or either of them, are bound by all of said provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, exceptions, and reservations, and are in equity and conscience estopped to resist or deny

the binding force and effect of same or any part thereof."

And whereas the court below sustained the joint demurrers of the defendants to said bill and to said cross-bill for want of equity, said court holding that the patent was itself conclusive of the agricultural quality of the lands described therein, and that the mineral exception therein expressed was nugatory; whereupon a decree was entered dismissing the bill and the cross-bill, from which decree appeals are taken to this court; and said cause on the appeals having been argued and submitted to this court, and whereas the decision of the case on the appeals depends wholly upon the proper construction of the said grant to the railroad company and the patent which issued thereupon, and the questions so involved are of public importance and effect the rights of locators of numerous mining claims on the lands included in said patent, and there are now pending in this court, on appeal three cases and other cases will be appealed to this court, the decision of which depend upon the proper answer to the questions herein certified, and this court is in doubt and is divided in opinion upon the proper answer to the said questions, the following questions are hereby certified to the Supreme Court of the United States for its decision.

First. Did the said grant to the Southern Pacific Railroad Company include mineral lands

which were known to be such at or prior to the date of the patent of July 10, 1894.

Second: Does a patent to a railroad company under a grant which excludes mineral lands as in the present case, but which is issued without any investigation upon the part of the officers of the land office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral.

Third: Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect.

Fourth: If the reservation of mineral lands as expressed in the patent is void, then is the patent upon a collateral attach a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuances of the patent have been complied with.

Fifth: Is petroleum or mineral oil within the meaning of the term mineral as it was used in said acts of congress reserving mineral land from the railroad land grants.

Sixth: Does the fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the railroad company prevent him from attaching the patent on the ground of fraud, error or irregular-

ity in the issuance thereof as so alleged in the bill.

Seventh: If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the defendants, Southern Pacific Railroad Company, and the Kern Trading and Oil Company, estopped to deny the validity of said clause?

Dated March 18th, 1912.

(Signed) WILLIAM B. GILBERT,
Circuit Judge.
WM. W. MORROW,
Circuit Judge.
CHAS. E. WOLVERTON,
District Judge.

(Endorsed.) Certificate of United States Circuit Court of Appeals for the Ninth Circuit, under section 134 of the Act of Congress of March 3, 1911, certifying certain questions to the Supreme Court of the United States. Filed April 1, 1912, F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.